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TALKING BACK TO CYBER-MOM: CHALLENGING THE COMMUNICATIONS DECENCY ACT OF 1996

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NOTE

TALKING BACK TO CYBER-MOM: CHALLENGING THE COMMUNICATIONS DECENCY ACT OF 1996

Whether by accident or by design, sooner or later just about any Internet surfer is likely to encounter material that might be considered objectionable. In all cases, the best option is supervision.[1]

[I]t is the responsibility of parents and families in the first place, and not Big Brother, to make these decisions about what children should see.[2]

As Joe Kilshiemer's twelve-year old son's technological skills and sense of independence age two or three years with each birthday, Joe understands the impracticability of constantly monitoring what his son views on the Internet.[3] "Hardly a day goes by anymore when I am not asked by someone if I: a) Have seen dirty pictures on the Internet; b) know where to find dirty pictures; and, c) know how to keep kids away

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[1] Chuck Melvin, *How Parents Can Control Content on Kids' Computers*, PLAIN DEALER, Sept. 23, 1996, at 5D (providing solutions on how to establish parental control over what your child sees over the Internet); *see also* Doug Levy, *Sex Ed Should Start With Parents*, USA TODAY, Oct. 28, 1996, at 1D (quoting Dr. Marjorie Hogan of the American Academy of Pediatrics urging parents to "[d]iscuss sexuality with children early, before they are bombarded with sexual messages from the media.").

[2] *See* Jack Kraft, *Parents Should Keep Smut Off The Internet*, MORNING CALL (Allentown), Sept. 18, 1996, at B5 (quoting Stefan Presser, Director of the Philadelphia Chapter of the American Civil Liberties Union).

[3] *See* Joe Kilshiemer, *Controlling Kids' Access To Unsavory Net Sites; Programs And Features Abound To Help Parents Screen What Their Children See On The Internet*, ORLANDO SENTINEL, Sept. 7, 1996 at E1.

from the steamy stuff."[4] Well Joe, Congress, in its infinite wisdom, tried to answer the third question for you.

The Communications Decency Act of 1996, which would have made illegal, and thus, effectively placed a blanket ban over, all "obscene" and "indecent" material transmitted over the Internet, was passed as a last-minute addition to the Telecommunications Act of 1996.[5] The Communications Decency Act was passed in response to the increasing amount of pornography available to children on the Internet.6 Section 223 of the Act provided, in part, that:

> [any person] in interstate or foreign communications . . . by means of a telecommunications device knowingly-makes, creates, or solicits, and, initiates the transmission of, any comment, request, suggestion, proposal, image, or other communication which is obscene or indecent, knowing that the recipient of the communication is under 18 years of age . . . shall be fined under Title 18, or imprisoned not more than two years, or both.[7]

The Act further provided that:

> [any person who] in interstate or foreign communications knowingly . . . send[s] to a specific person or persons under 18 years of age, or uses any interactive computer

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[4] *Id.* (discussing how "as the Internet grows more and more popular, so does, unfortunately, its reputation for a less-than-savory side").

[5] The Communications Decency Act, or Title V of the Telecommunications Act of 1996, is codified at 47 U.S.C. A. § 223 (1996). The Act amends the Communications Act of 1934 and was signed into law by President Clinton on February 8, 1996. *See infra* Part IV. for the Supreme Court's analysis into the constitutionality of the Communications Decency Act of 1996.

[6] *See* Linda Greenhouse, *Spirited Debate in High Court On Decency Rules for Internet*, N.Y. TIMES, Mar. 20, 1997, at B10 (quoting Deputy Solicitor General Seth P. Waxman as stating "[t]he Internet 'threatens to give every child a free pass to every adult bookstore and video store' with the click of a mouse").

[7] 47 U.S.C.A. § 223(a)(1)(B).

> service to display in a manner available to a person under 18 years of age, any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . shall be fined under Title 18, or imprisoned not more than two years, or both.[8]

Needless to say, the Communications Decency Act was met with great resistance from the American Civil Liberties Union,[9] as well as several publishers, creators, service providers,[10] parent groups, libraries, speakers, listeners, and users of the Internet.[11] On the other hand, the Act was overwhelmingly endorsed by President Clinton and Congress, as well as the Family Research Council,[12] the Christian Coalition,[13] the National Law Center for Children and Families,[14] and other conservative activist groups.[15]

This note focuses on the Constitutional issues surrounding the Communications Decency Act of 1996. It explores the question of

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[8] 47 U.S.C.A. § 223(d)(1).

[9] *See infra* note 52.

[10] *See* ACLU v. Reno, 929 F. Supp. 824, 833 (E.D.Pa. 1996) (discussing the myriad of plaintiffs who opposed the Communications Decency Act, and explaining the role of "Internet service providers" and "online services" such as America Online, CompuServe, and Prodigy who provide full access to the Internet for a monthly or hourly fee to "almost twelve million individual subscribers across the United States").

[11] *Id.; see also* Dominic Andreano, *Cyberspace: How Decent is the Decency Act?*, 8 ST. THOMAS L. REV. 593, 602 (1996).

[12] *Reno*, 929 F. Supp. at 828 n. 4 (listing the myriad of groups who filed amici curiae briefs in opposition and support of plaintiff's motion for a preliminary injunction seeking to enjoin enforcement of § 223(a) and § 223(d) of the Communications Decency Act of 1996).

[13] *Id. See* Marie A. Failinger, *New Wine, New Bottles: Private Property Metaphors and Public Forum Speech*, 71 ST. JOHN'S L. REV. 217, 328 n.1 (1997).

[14] *Reno*, 929 F. Supp. at 828 n.4.

[15] *Id.; see also Court Ruling Heats Up Debate Over Internet Indecency* (CNN television broadcast, June 15, 1996); *see also* Hiawatha Bray, *Porn Battle Logs On; Activists Vow to Get Obscenity Off Line, Despite Ruling*, BOSTON GLOBE, June 14, 1996, at 37.

whether the Act, as written, infringed upon the First Amendment[16] rights of adults by preventing them from reading and viewing constitutionally protected communications. Secondly, the note explores whether the terms "indecent" and "patently offensive" are unconstitutionally vague under the Due Process Clause of the Fifth Amendment,[17] in that a violation of the statute could have resulted in a fine and/or imprisonment. Part One of the note will illustrate the workings of the Internet.[18] Part Two will discuss Congress' response to the influx of pornography available to children,[19] as well as what opponents of the Act challenged, and did not challenge.[20] Part Three will canvass the constitutional challenges to the Act set forth, and review the Government's interest in censoring speech. Furthermore, it will trace the Supreme Court's analysis of obscenity, indecency, and patently offensive material, to determine whether the material the Act sought to restrict is protected under the First Amendment, and whether the Act was the best, or least restrictive way (i.e. infringes the least on the First Amendment rights of adults) to prevent minors from viewing inappropriate material.[21] The note will specifically consider user-based technology that is available to parents, but ignored by Congress.[22] Part Four will discuss the Supreme Court case of *Reno v. ACLU*,[23] the landmark case that decided the constitutionality of the Communications Decency Act of 1996.[24]

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[16] *See* U.S. CONST. amend. I (providing that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances").

[17] *See* U.S. CONST. amend. V (providing in pertinent part that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law").

[18] *See* discussion *infra* Part I.

[19] *See* discussion *infra* Part II.A.

[20] *See* discussion *infra* Part II.B.

[21] *See* discussion *infra* Part III.

[22] *See* discussion *infra* Part III.

[23] 117 S.Ct. 2329 (1997).

[24] *See* discussion *infra* Part IV.

I. THE INTERNET

The Internet is a giant group of computer networks linked together for the purpose of exchanging information.[25] "The resulting whole is a decentralized global medium of communications - or 'cyberspace' - that links people, institutions, corporations, and governments around the world."[26] Because the Internet is decentralized (i.e. controlled by each individual computer's operator), there is no central way to oversee and control what is transmitted via the Internet.[27]

Individuals may access the Internet in a variety of ways. They may use a personal computer that is connected to a computer network, which is connected to the Internet,[28] or they may use a personal computer with a modem to connect over a telephone line to a network that is itself connected to the Internet.[29] The most common example of such access is through one of the major commercial services, which provides subscribers with full access to the Internet for hourly or monthly fees.[30] Once accessed, individuals may communicate over the Internet through several different mediums.[31] Individuals may electronically mail ("e-mail")[32] communications to one another or to a particular mailing list of

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[25] *See generally* ACLU v. Reno, 929 F. Supp. at 830-31 (estimating the number of host computers in the United States linked to the Internet to be greater than five million). The Internet is derived from a military program called Advanced Research Project Agency, or ARPANET, which was created "to enable computers operated by the military, defense contractors, and universities conducting defense-related research to communicate with one another by redundant channels even if some portions of the network were damaged in a war." *Reno*, 117 S.Ct. at 2334.

[26] *Reno*, 929 F.Supp. at 831 (stating that "[t]he Internet is an international system").

[27] *Id.* at 830, 843 (explaining that "[s]exually explicit material is created, named, and posted in the same manner as material that is not sexually explicit [thus] [o]nce a[n] [individual] posts content on the Internet, it is available to all other Internet users worldwide").

[28] *Id.* at 832-33 (listing the "variety of avenues to access cyberspace in general, and the Internet in particular," including computers found at universities, libraries, corporations, government offices, community groups, or computer coffee shops).

[29] *Id.* at 832.

[30] *Id.* at 833.

[31] *Reno*, 929 F. Supp. at 834-38.

[32] *Id.* at 834.

subscribers.[33] Individuals may also interact in "real time"[34] or gain access to information located on a different computer in a different location in "real time" as if speaking on the telephone, regardless of where each party is located.[35] Finally, the most popular form of communication over the Internet is "remote information retrieval;"[36] the best-known form being "The World Wide Web."[37]

II. SEXUALLY EXPLICIT MATERIAL ON THE INTERNET

A. Congress' Response

For better or worse, sexual material is available on the Internet. Like researching the history of the American Revolution on the Web, or sending mom an e-mail telling her you love her, "[s]exually explicit material is created . . . posted [and accessed] in the same [easy] manner."[38] Because of the Internet's decentralized design, once a user creates a message or image, it is accessible "to Internet users around the world" including children.[39] In other words, a creator or sender of sexually explicit material (or any material for that matter) cannot pick and choose who may see his message or image.[40] The result is that individuals who

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[33] *Id.*

[34] *Id.* at 835 (describing "real time" as immediate dialogue between two or more users of the Internet).

[35] *Id.*

[36] *Reno*, 929 F. Supp. at 835 (defining "remote information retrieval" as "the search for and retrieval of information located on remote computers").

[37] *Id.* at 836 (stating that The Web functions as an information mega-database). Each document within the database (whether it contains "text, still images, sounds, [and] video") has an address or link making it easily accessible to any viewer. *Id.*

[38] *Id.* at 844.

[39] *Id.* at 836, 844-45 (explaining that Web publishers may choose to restrict their sites to only those individuals who have user names and passwords). However, many publishers open their sites to the public audience, and they usually do, since open publication offers the communication to the largest possible audience. *Id.* at 836.

[40] *Id.* at 844.

have no interest in receiving sexually explicit material may either receive it or inadvertently be exposed to it.[41]

Studies suggest that pornography is running amok over the Internet.[42] In actuality, however, users will rarely enter a site containing sexually explicit material unless they intended to do so.[43] Nevertheless, in order to protect children from the harms of pornography,[44] Congress, with bi-partisan support, decisively passed the Communications Decency Act of 1996.[45] The Act, an amendment to the Communications Act of 1934,[46] was a broad attempt to regulate (i.e. censor) material transmitted over the Internet.[47] In addition to policing "commercial purveyors" of pornography, the Act would have regulated communications amongst private individuals.[48] Specifically, the law targeted the effects of obscene and

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[41] *Reno*, 929 F. Supp. at 844 (including non-sexually explicit material as well).

[42] *See* Laura J. McKay, *The Communications Decency Act: Protecting Children From On-Line Indecency*, 20 SETON HALL LEGIS. J. 463, 470 (1996) (citing MARTY RIMM, PORNOGRAPHY AND SEXUAL VIOLENCE; EVIDENCE OF THE LINKS 1914 (1988) finding "83.5 percent of all graphics posted on Usenet, [a network with access to the Internet], are pornographic"). *See also Click, Click, and Suddenly You're in Pornland*, NAT'L. J. 1339 (1995) (stating that "pornography is available in many forms in cyberspace"). *But see* Amy Harmon, *For Parents, a New and Vexing Burden*, N. Y. TIMES, June 27, 1997 at A21 (stating that "only about 3 percent of the commercial sites on the Web traffic in adult material"). However, in a recent survey of 10,000 households nearly 30 percent of those households visited adult sites with 8 percent of those visits done by teen-agers. *Id.*

[43] ACLU v. Reno, 929 F. Supp. at 844-45 (explaining that a warning precedes virtually all communications containing sexually explicit images, and that according to Special Agent Howard Schmidt, Director of the Air Force Office of Special Investigation, "the 'odds are slim' that a user would come across a sexually explicit site by accident.").

[44] *See* McKay, *supra* note 42 at 473. There are alternative views on the effects of pornography. *Id.* One view establishes a link between exposure to pornography and violence against women. *Id.* The other view links "prolonged exposure to sexually explicit and violent materials" with a numbness to violence, especially in children. Stephen J. Gould, *The Production, Marketing, and Consumption of Sexually Explicit Material In Our Sexually Conflicted Society*, 11 J. OF PUB. POL'Y & MARKETING 135, 140 (1992).

[45] 47 U.S.C.A. §223.

[46] *See* 47 U.S.C.A. § 223, (referring to the original June 19, 1934 act as "the Communications Act of 1934").

[47] *See generally* Shea v. Reno, 930 F. Supp. 916 (S.D.N.Y. 1996).

[48] *Id.* at 922.

indecent material on those under the age of eighteen and would have made such communications illegal, while leaving protected much of the same material transmitted by, and amongst, adults.[49] However, therein lies the dilemma; for it is impossible, in light of the manner in which the Internet operates, to keep sexually explicit transmissions from children under the age of eighteen, while still permitting adults ages eighteen and over to view them.[50] In effect, the Communications Decency Act of 1996 would have enjoined individuals above the age of eighteen from engaging in activity that the legislature and the Supreme Court have declared protected speech for adults.[51]

B. The Challenge to the Communications Decency Act of 1996

The American Civil Liberties Union ("ACLU") was the leading opponent of the Communications Decency Act of 1996.[52] On February 8, 1996, the day the Act was signed into law, the ACLU moved for a temporary restraining order to enjoin enforcement of the Act. The ACLU claimed that the Act, on its face, was unconstitutionally vague, because under the terms of the Act,[53] an individual could not discern what types of

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[49] *Id.*

[50] *See* ACLU v. Reno, 929 F. Supp. at 854-56; *see supra* text accompanying notes 38-41.

[51] *But see* 47 U.S.C.A. § 223(e)(5)(A) and 47 U.S.C.A. § 223(e)(5)(B) (providing as a defense to any prosecution under the Communications Decency Act, that "[any person who] has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a communication . . . including any method which is feasible under available technology; or has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number [shall not be held liable under the Act.]" *Compare with infra* notes 200-212 (discussing the non-feasibility of such technology).

[52] *See Reno*, 929 F. Supp. at 827. The American Civil Liberties Union was the named party to the suit, however, "plaintiffs [also] represent[ed] a broad range of individuals and entities . . . including [the American Library Association, which originally filed its own complaint in the Pennsylvania District Court], and parents, who sought to protect the rights of parents to decide what is appropriate for their children to receive through interactive computer communications." *See* plaintiff's complaint at 1, *American Library Assoc. v. U.S.* (No. 96-1458).

[53] 47 U.S.C.A. § 223 (1996).

transmissions could subject them to prosecution.[54] In granting a temporary injunction against enforcement of Section 223(a) of the Act, so far as it related to the term "indecent," but not "obscene," Pennsylvania Federal District Court Judge Buckwalter found the term "indecent" troublesome, because it was doubtful whether "the word 'indecent' ha[d] ever been defined by the Supreme Court."[55] However, Judge Buckwalter denied the ACLU's motion to enjoin enforcement of Section 223(d) of the Act, finding it both narrowly tailored and well defined.[56] On June 11, 1996, the ACLU and the American Library Association[57] moved for declaratory and injunctive relief, seeking to proscribe enforcement of Section 223(a) of the Act and the still viable Section 223(d) of the Act on First and Fifth Amendment grounds.[58] The ACLU claimed that the Act would unconstitutionally abridge the First Amendment rights of adults and do so even though there were less intrusive alternatives that would be more protective of minors.[59] The ACLU argued that although the Act was probably intended to protect children from inappropriate material, the Act would, because of the nature of cyberspace,[60] "have the effect . . . of depriving adults of communications that are appropriate, and indisputably

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[54] *Reno*, 929 F. Supp. at 861.

[55] *See* ACLU v. Reno, 1996 WL 65464, at *3 (E.D. Pa. 1996) (granting plaintiffs a temporary restraining order enjoining the government from enforcing § 223(a)(i)(B)(ii)).

[56] *See Reno*, 929 F. Supp. at 858. Judge Buckwalter would eventually change his standing on the issue of whether the statute is narrowly tailored. *Id.* After learning more facts, Judge Buckwalter concluded that the defenses provided for the Act were unfeasible, thus failing to narrowly tailor the restriction on speech. *Id.*

[57] *Reno*, at 827-28 (consolidating the first ACLU action with a second suit brought by the American Library Association, Inc. seeking injunctive relief as to sec. 223(d) of the Act).

[58] *See also Shea*, 930 F. Supp. 916 (discussing a second cause of action for injunctive relief brought in New York Federal District Court on August 19, 1996). "[P]laintiff, [Shea], [is] an editor, publisher, and part-owner of a newspaper distributed exclusively through electronic means [who] brings this First Amendment challenge to § 223(d) of the Communications Decency Act of 1996 [claiming that the Act is] unconstitutionally vague [and] overbroad . . . ." *Id.* at 922. *See also Computer Indecency Law Declared Void*, 216 N.Y. L.J. 25 (Aug. 19, 1995).

[59] ACLU v. Reno, 929 F. Supp. at 855-56.

[60] *See supra* text accompanying notes 25-27, 38-41, 50-51.

constitutionally protected, for them."[61] Moreover, Congress, in enacting the Communications Decency Act of 1996, ignored alternative, more effective ways of restricting minors from viewing inappropriate material, while ensuring access by adults to such material.[62] The answer, according to opponents of the Act lies in "user-based blocking technology."[63] Such technology enables parents, not the government, to censor what their children see, while allowing them, as adults, to view material that is constitutionally protected.[64]

Opponents of the Communications Decency Act of 1996 did not wish, nor argue, that all speech transmitted via the Internet should be protected by the First Amendment, and, thus, be made legal.[65] The communications at issue were only those that were not already proscribed by existing law.[66] Opponents of the Act did not seek to allow obscenity, child pornography, harassing speech, or speech intended to entice or lure

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[61] Plaintiff's complaint at 1, *American Library Association v. U.S.* (No. 96-1458). Such speech, because of the broad language of the statute, could have included "works of literature and art, information about health and medical issues, and examples of popular culture." *Id.* It also includes robust human discourse about politics, current events, and personal matters that may at times include harsh, provocative, or even vulgar language, all of which is constitutionally protected for adults." *Id.*

[62] *Id.*

[63] *Id*; *see infra* text accompanying notes 214-218, 224. *America Online Partners With Microsystems Software To Enhance Parental Controls; Provides Parents With Ability to Block Inappropriate Internet Sites; Adds Thousands of Special Children's Sites To Its Award-Winning Kids Only Channel*, PR Newswire, Sept. 9, 1996, available in LEXIS, Nexis Library, PR Newswire File (discussing the technology available that "provide[s] parents with the option of restricting children only to those Internet sites pre-selected as the best for children and adolescents").

[64] *See* Plaintiff's complaint at 2, *American Library Assoc. v. U.S.* (No. 96-1458); *see also* Touching Home, CHIC. SUN-TIMES, Nov. 3, 1996, at 53 (quoting members of the American Academy of Pediatrics advising parents to "'take control of sex education' [in order] to keep children from getting the wrong messages from television, music and the Internet").

[65] ACLU v. Reno, 929 F. Supp. at 829.

[66] *Id.* (recounting how plaintiffs were not challenging the statute's inclusion of obscenity and child pornography already proscribed by law).

minors into inappropriate activity, over the Internet.[67] The contention was solely over the infringement of the First Amendment rights adults already enjoy.[68]

III. THE CONSTITUTIONAL ANALYSIS

A. Obscenity: The Case Law

1. Roth v. United States[69]

For forty years, the Supreme Court has attempted to define the parameters of obscenity and whether proponents of such material may be held criminally liable, notwithstanding the First Amendment, for their possession and/or promotion of obscene material.[70] The first case that addressed the issue of whether obscenity is within the scope of protected speech was *Roth v. U.S.*[71] Defendant Roth, a New York publisher and seller, was convicted of mailing obscene advertising and an obscene book in violation of Title 18, United States Code, Section 1461, the federal obscenity statute.[72] In sustaining the federal law, the Court never actually reached the question of whether Roth's materials were obscene.[73] Instead,

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[67] *See* Reno v. ACLU – Transcript of Supreme Court Oral Argument (visited Mar. 24, 1997) <http://www.aclu.org/issues/cyber/trial/sctran.html>, at 20. *Id.* (recognizing that such speech is not constitutionally protected).

[68] *See infra* notes 189-90 (explaining the New York and Pennsylvania District Courts' rulings on plaintiff's motions for temporary injunctions).

[69] 354 U.S. 476 (1957).

[70] GERALD GUNTHER, CONSTITUTIONAL LAW 1095-98 (12th ed. 1991).

[71] 354 U.S. 476 (1957).

[72] *Id.* at 479-80. On appeal to the Supreme Court, Roth's case was joined with Alberts v. California, 292 P.2d 90 (Cal. 1956), a case involving a violation of California's Penal Code. *Roth*, 354 U.S. at 479, 481.

[73] *See generally Roth*, 354 U.S. 476.

the Court, following its dictum in *Chaplinsky v. New Hampshire*[74] and *Beauharnais v. Illinois*[75] declared that obscenity, per se, is categorically[76] not protected under the First Amendment.[77] In providing the Court's first analysis into obscenity, Justice Brennan declared that obscenity is "utterly without redeeming social importance."[78] However, in establishing the first American standard of obscenity, the Court distinguished obscenity from sex in artistic, literary, and scientific works.[79] The standard was: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[80] Such a standard was intended to safeguard sexual material with "redeeming social importance."[81] The Court noted that "[s]ex, [as opposed to obscenity, is] a great and mysterious motive force in human life, [which] has indisputably been a subject of absorbing interest to

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[74] 315 U.S. 568, 572 (1942) (explaining that there is just certain speech that does not fall under the protection of the First Amendment, including "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words'"); *see* GUNTHER, *supra* note 70, at 1069-70.

[75] 343 U.S. 250, 256-57, 266 (1952) (following *Chaplinsky* and applying a categorical approach in determining that libel, like obscenity, was a realm of speech without protection under the First Amendment).

[76] *See* GUNTHER, *supra* note 70 at 1069-70 for a discussion on categorization. The categorization approach, as opposed to the balancing approach, "on a wholesale basis find[s] certain varieties of speech unprotected because the claim simply does not belong in the First Amendment ballpark . . ." *Id.* at 1069. "The balancing approach, by contrast, asserts . . . that a very broad range of expression is presumptively within the First Amendment and can be found unprotected only after the restrictions are subjected to strict judicial scrutiny . . . ." *Id* at 1070. *See also infra* notes 145-46.

[77] *Roth*, 354 U.S. at 484-85.

[78] *Id.* at 484.

[79] *Id.* at 487. The standard in *Roth* refined the English standard set forth in Regina v. Hicklin, [1868] L.R. 3 Q.B. 360 (judging obscene material by the effect of the material "upon [the most] susceptible persons"). *See Roth*, 354 U.S. at 488-89 (quoting the *Hicklin* decision). The Roth standard, instead, measured obscene material by contemporary community standards. *Roth*, 354 U.S. at 488-89.

[80] *Roth*, 354 U.S. at 489. The Court utilized WEBSTER'S NEW INTERNATIONAL DICTIONARY (2d ed. 1949) to define prurient, "in pertinent part, as [] [i]tching; longing; uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity or propensity, lewd . . . ." *Id.* at 487 n.20.

[81] *Roth*, 354 U.S. at 484.

mankind through the ages."[82] Having found the lower court to have sufficiently applied the standard, the Supreme Court sustained the validity of the federal statute and Roth's conviction.[83]

2. Miller v. California

For nearly twenty years, American courts applied the standard enunciated in *Roth*.[84] However, the courts struggled with the national standard set forth in *Roth*, for its failure to account for geographic diversity lead to inconsistent convictions and confusion.[85] In *Miller*, Chief Justice Burger seized the opportunity to clarify the deficiencies of *Roth* and established a modern analysis bearing in mind the local interest.[86] In *Miller*, the appellant was convicted under California Penal Code Section 311.2(a)[87] for mailing five unsolicited brochures advertising the sale of adult material.[88] In reviewing the conviction, Justice Burger modified the categorical approach of *Roth* and substituted a new standard, enabling lower courts to more readily identify obscenity.[89] The *Miller* test provides the following guidelines in determining whether material is obscene:

(a) whether 'the average person, applying contemporary

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[82] *Id.* at 487.

[83] *Id.* at 489. Roth signified the Court's adoption of this standard as the one to be applied in assessing the validity of both state and federal obscenity statutes. GUNTHER, *supra* note 70, at 1103. In dissent, Justice Harlan vehemently opposed Roth's conviction noting the important distinction between the power of the state to police morality, safety, and welfare and the federal government's lack of authority to regulate in this area. *Roth*, 354 U.S. at 498, 503-06 (Harlan, J., dissenting).

[84] *See* GUNTHER, *supra* note 70 at 1096.

[85] *See generally* Miller v. California, 413 U.S. 15, 32-33 (1973).

[86] *Id.* at 30-34.

[87] *Id.* at 16. The California obscenity statute, CAL. PENAL CODE § 311.2(a), made the distribution of obscene matter a misdemeanor. *Id.*

[88] *Id.* at 18 (describing the material as "explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed").

[89] *Id.* at 24.

> community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[90]

Thus, the courts could now, more readily, distinguish between protected and unprotected (i.e. obscene) material.[91] This standard, unlike the *Roth* standard, narrowly defines "prurient," and considers the context in which the material is presented, in order to further safeguard against the restriction of material that might otherwise be threatened under the *Roth* standard.[92] Furthermore, the Court recognized the inadequacy of the national standard of *Roth* and replaced it with a local standard, thus remedying the ambiguities inherent in the national standard approach.[93] As a result, the community standard for each locality dictates what materials are deemed prurient or patently offensive, thus accommodating the nation's moral diversity.[94]

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[90] *Miller*, 413 U.S. at 24 (citations omitted).

[91] *Id.*

[92] *Id.* at 26 (providing the example of "medical books . . . necessarily us[ing] graphic illustrations and descriptions of human anatomy").

[93] *Id.* at 32 (explaining that a law interpreting the First Amendment to require "the people of Maine or Mississippi [to] accept public depiction of conduct found tolerable in Las Vegas, or New York City" is not a "constitutionally sound" law).

[94] *Miller*, 413 U.S. at 25 (providing the following examples of patently offensive material a state may consider disallowing: "a) [R]epresentations or descriptions or representations of ultimate sexual acts, normal or perverted, actual or simulated. b) [R]epresentations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals").

B. Offensiveness and Indecency: The Case Law

1. Cohen v. California[95]

As opposed to the "fighting" words held unprotected by the First Amendment in *Chaplinsky*[96] and speech "directed to inciting or producing imminent lawless action" in *Brandenberg v. Ohio*,[97] there is certain language that poses no immediate danger, but, instead, inflicts "psychological or emotional injury" on its captive audience.[98] *Cohen* signifies "the [Supreme] Court's first major encounter with the offensive language problem."[99] Defendant Cohen "was convicted . . . of violating . . . California Penal Code, § 415, which prohibit[ed] '[the]malicious and willful disturbing [of] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . .'"[100] On April 26, 1968, Cohen walked through the corridor of the Los Angeles County Courthouse wearing a jacket bearing the words "Fuck the Draft."[101] Justice Harlan noted that Cohen's conviction "rest[ed] upon the asserted offensiveness of the *words* Cohen used to convey his message to the public."[102] However, the offensive words, according to Justice Harlan, constituted speech, not conduct, and thus, Cohen's conviction could not be sustained.[103] The Court also felt that the statute under which Cohen was convicted was too

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[95] 403 U.S. 15 (1971).

[96] *See generally Chaplinsky*, 315 U.S. at 571-72 (holding that certain words that are likely to cause "an immediate breach of the peace" or "which by their very utterance inflict injury" are categorically outside the protection of the First Amendment).

[97] Brandenberg v. Ohio, 395 U.S. 444, 447,449 (1969) (adopting Justice Holmes' "clear and present danger" test to determine the scope of First Amendment protection to be given to advocacy speech as expressed by Justice Black who concurred with the Court's opinion).

[98] *See* GUNTHER, *supra* note 70, at 1137-38.

[99] *Id.*

[100] *Cohen*, 403 U.S. at 16.

[101] *Id.*

[102] *Id.* at 18 (emphasis in original).

[103] *Id.* Justice Harlan looked to the text of the California ordinance which prohibited "conduct" and not "speech" that breached the peace. *Id.* at 16 & n.1. Having found Cohen's expression speech and not conduct, the Court reversed his conviction. *Id.* at 26.

ambiguous to sustain his conviction, because it failed to "put [Cohen] on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places."[104] The Court also distinguished this case from the obscenity cases, because the expletive at issue would not ordinarily yield an erotic image in the mind of the individual who read it.[105] Most importantly, the Court stated that Cohen was neither trying to incite others in the courtroom to violence, nor wearing the jacket with the intention of personally insulting anyone who might see it.[106] The Court refusing, however, to categorically protect all speech, balanced the state's interest in protecting those offended by offensive speech against an individual's constitutional right to free expression.[107] The Court, weighing the two interests, held that the state's interest in protecting captive audience members from the injury resulting from exposure to indecent speech was not substantial, since people in the Los Angeles courthouse could have easily looked the other way and avoided seeing Cohen's questionable display.[108] The Court noted the difference between confronting individuals with noxious or offensive displays in the privacy of their own homes and subjecting people to such a display in a public courthouse.[109] While an individual does not anticipate being confronted with such offensive displays in his home, an individual in the latter group, because of the nature of the public setting, should be more expectant of displays that may be offensive to him.110 Thus, the burden fell on the audience to "avert[] their eyes" and not on Cohen to censor himself.[111]

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[104] *Id.* at 19.

[105] *Cohen*, 403 U.S. at 20 (noting offensive and indecent speech, unlike obscenity, is not categorically unprotected by the First Amendment).

[106] *Id.*

[107] *Id.* at 21-22.

[108] *Id.* at 15 (stating that "the First . . . Amendment[] ha[s] never been thought to give *absolute* protection to every individual to speak whenever or wherever he pleases . . . ." thus, opening the door to a potential restriction, but not proscription, on speech) (emphasis added).

[109] *Id.* at 21-22.

[110] *Cohen*, 403 U.S. at 21-22.

[111] *Id.*

2. Erznoznik v. Jacksonville[112]

In *Erznoznik*, the Supreme Court expounded upon the First Amendment protections afforded to offensive and indecent material.[113] *Erznoznik*, following the *Cohen* approach, invalidated Jacksonville Municipal Code § 330.313,[114] which prohibited drive-in movie theaters with screens facing the public highways from showing movies containing nudity.[115] The City of Jacksonville offered various justifications in attempt to defend the ordinance.[116] The City first claimed a great interest in protecting individuals against unsolicited, offensive material.[117] Notwithstanding the interest, Justice Powell elucidated on the *Cohen* approach and struck down the ordinance.[118] Justice Powell deciphered between intrusion into one's home and exposure to offensive material in the public domain, and held that such speech could only be restricted when an intrusion occurs in the privacy of one's home, thus making it "impractical for the unwilling viewer or auditor to avoid exposure."[119]

The second justification advanced in defense of the ordinance was that the ordinance was intended to protect children from viewing inappropriate material.[120] However, Justice Powell dismissed this claim, finding the ordinance potentially overbroad in its application.[121] Because the ordinance prohibited the showing of all nudity, in effect, it barred the

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[112] 422 U.S. 205 (1975).

[113] *Id.* at 209.

[114] *Id.* at 206 (prohibiting any drive-in theater from showing of "the human male or female buttocks, human female bare breasts, or human bare pubic areas . . . .").

[115] *Id.* The Court found the ordinance to be impermissibly content based before deciding upon the indecency issue. *Erznoznik*, 422 U.S. at 211-12.

[116] *Id.* at 208, 212, 214.

[117] *Erznoznik*, 422 U.S. at 208 (explaining that the city's primary interest was "protect[ing] its citizens against unwilling exposure to materials that may be offensive").

[118] *Id.* at 209-11 (citing *Cohen*).

[119] *Id.* at 209.

[120] *Id.* at 212. The protection of children, asserted as a secondary justification in *Erznoznik*, has served as the government's primary justification in many subsequent First Amendment challenges. *See, e.g.*, Reno, 929 F. Supp. at 852.

[121] *Erznoznik*, 422 U.S. at 214.

display of nudity not deemed inappropriate for children.[122]

3. FCC v. Pacifica Foundation[123]

After *Erznoznik*, the Court began to move away from the traditional blanket protection given to offensive and indecent speech.[124] In particular, Justice Stevens advocated that not all indecent and offensive speech deserved the same level of protection as provided for in the past.[125] In a series of cases following *Erznoznik*, the Court began to apply this rationale and measure the value of the speech involved against the asserted governmental interest, and began to sustain various ordinances prohibiting offensive and indecent speech.[126] *Pacifica*, although a plurality opinion, exemplifies the Court's invocation of the "lower value speech" approach.[127] *Pacifica* involved the airing of a satiric monologue, "Filthy Words," during an afternoon radio broadcast.[128] The monologue contained profane language, which the FCC found patently offensive and

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[122] *Id.* at 213 (providing examples of nudity not obscene to children such as "film[s] containing a picture of a baby's buttocks, the nude body of a war victim, or scenes from a culture in which nudity is indigenous").

[123] 438 U.S. 726 (1978).

[124] *See* GUNTHER, *supra* note 70, at 1146-54.

[125] *Id.* at 1146. Acknowledging that such speech, unlike obscenity, is categorically protected, Justice Stevens placed a lower value on offensive speech, and applied a balancing test to determine whether the government could restrict it. *Id.*

[126] *See, e.g.*, Young v. Am.Mini Theatres, 427 U.S. 50, 70 (1976) (holding that the non-obscene, although erotic, speech in question here was not of the same value as political speech, thus should be afforded a different degree of constitutional protection so long as the governmental interest adequately supports the classification). There are "[certain] words [that] offend for the same reasons that obscenity offends. . . . [They] are no essential part of any exposition of ideas, and are of such slight social value . . . that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." FCC v. Pacifica Foundation 438 U.S. 726, 746 (1978).

[127] *See infra* note 125 (discussing this approach).

[128] *Pacifica*, 438 U.S. at 726.

in violation of federal broadcasting standards.[129] A father, who heard the broadcast while he was driving with his young son, filed the initial complaint against Pacifica Foundation with the FCC.[130] Although the FCC did not impose formal sanctions against Pacifica, it did require Pacifica to air such satire at times when children would not be expected to be listening to the radio.[131] In sustaining the FCC's restriction, Justice Stevens held that the language used by Carlin "lack[ed] literary, political, [or] scientific value" and, therefore, was not worthy of the traditional First Amendment protections that had been afforded to non-obscene speech.[132] In reaching its decision, the Court looked at the circumstances surrounding the use of the language.[133] Unlike *Cohen* and *Erznoznik*, the offensive speech in question here invaded the privacy of individual homes.[134] Justice Stevens specifically concentrated on the accessibility of the broadcast medium to children.[135] He also noted that the time of day the monologue was aired was emphasized by the FCC.136 Based on these considerations, the Court found the FCC's mandate not to be

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[129] *Id.* (stating that *Pacifica* violated Title 18, United States Code, Section 1464, which prohibited the use of "any obscene, indecent, or profane language by means of radio communication"). Carlin's monologue discussed, in great detail, the seven words that could never be used on the airwaves. They were: "shit, piss, fuck, cunt, cocksucker, motherfucker, and tits." *Pacifica*, 438 U.S. at 751.

[130] *Id.* at 726 (explaining that the monologue aired over a radio station owned by Pacifica Foundation).

[131] *Id.* at 733 (explaining that the FCC "[did not] intend[] to place an absolute prohibition on the broadcast of this type of language, but rather sought to channel it to times of day when children most likely would not be exposed to it").

[132] *Id.* at 745-46 (applying the lower value speech approach, and finding Carlin's language to be of a lesser value than other speech).

[133] *Pacifica*, 438 U.S. at 747-48 (recognizing that "each medium of expression presents special First Amendment problems") (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952).

[134] *Id.* at 748-50.

[135] *Id.* at 749.

[136] *Id.* at 750.

overreaching.[137] The FCC merely restricted speech in this case, it did not proscribe it.[138] Moreover, Justice Stevens noted that the material in question was still available to adults through other means.[139] In dissent, Justice Brennan, in addition to declaring all non-obscene material protected by the First Amendment, specifically noted the responsibility of parents, rather than the government, to regulate what their children hear or see.[140]

4. Sable Communications of California, Inc. v. FCC[141]

In 1988, Congress amended the Communications Decency Act of 1934 in order to ban indecent and obscene interstate commercial telephone messages.[142] In *Sable*, the Supreme Court, in an opinion by Justice White, upheld the provisions of the Act dealing with obscenity, in accordance with the Court's long history of holding obscenity outside the realm of constitutional protection.[143] However, the Court, narrowing the holding of *Pacifica*, refused to uphold the portion of the Act prohibiting indecent speech, finding such speech constitutionally protected.[144] The Court, finally forming a majority opinion as to the standard of review to be applied, performed a strict scrutiny analysis.[145] The Court first

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[137] *Id.* Challenges of vagueness and overbreadth were claimed by Pacifica Foundation, however, Justice Stevens found the restriction not to "reduce adults to hearing only what is fit for children." *Id.* n.28 (citing Butler v. Michigan, 352 U.S. 380, 383 (1957)).

[138] *Pacifica*, 438 U.S. at 745.

[139] *Id.* at 750 n.28 (commenting that adults could still purchase such material or view and listen to such performances at theaters and nightclubs).

[140] *Id.* at 769-70.

[141] 492 U.S. 115 (1989).

[142] *Id.* at 117-18.

[143] *Id.* at 124.

[144] *Id.* at 126. The Court in *Sable*, acknowledging offensive and indecent speech as constitutionally protected, provided a standard of review akin to due process and equal protection analysis, in order to determine, on a case by case basis, whether the government could restrict the offensive or indecent speech. *Id.*

examined whether the governmental interest in protecting children from indecent speech -- the hallmark of the dial-a-porn messages -- was compelling, and secondly, whether the Act was narrowly tailored so that it least restricted the First Amendment rights of adults.[146] Although Justice White acknowledged the compelling governmental interest in protecting the sensibilities of children, the Court, nevertheless, found the indecency provision of the Act overbroad in its attempt to protect children from exposure to indecent speech.[147] Because the Act placed a blanket ban on a form of speech which could, through less restrictive means, such as credit card authorization, access codes, or scrambling devices, safeguard children from the effects of exposure, the Act could not survive strict scrutiny.[148] Further distinguishing the restriction from that in *Pacifica*, the Court noted that the accessibility of offensive material in *Sable* required affirmative action by the recipient, thus removing the element of surprise (i.e. lack of warning) that was dispositive in Pacifica.[149]

5. Denver Area Educational Telecommunications Consortium v. FCC;[150] *and Alliance For Community Media v. FCC*[151]

Recently, the Supreme Court heard arguments on two cases challenging the Cable Television Consumer Protection and Competition Act of 1996.[152] *Denver Area Consortium* and *Alliance for Community*

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[145] *Id.* at 126 (providing that strict scrutiny review requires both a compelling governmental interest in restricting speech and narrowly tailored to achieve the governmental interest in order to pass constitutional muster).

[146] *Pacifica*, 492 U.S. at 126.

[147] *Id.* at 131.

[148] *Id.* at 128, 131.

[149] *Id.* at 127-28 (stating that here "[t]here is no 'captive audience' problem . . . callers will generally not be unwilling listeners").

[150] 116 S. Ct. 2374 (1996).

[151] 10 F.3d 812 (D.C. Cir. 1993).

[152] *See generally* Denver Area Educational Telecommunications Consortium, Inc. v. FCC, 116 S.Ct. 2374, 2377 (1996) (holding that sections 10(a), (b), and (c) of the Cable Television Consumer Protection and Competition Act of 1992 did not violate the First

Media raised challenges to three statutory provisions regulating the broadcasting of "patently offensive" sex-related material on both leased access television channels[153] and public access television channels.[154]

The first provision, which allows for a cable system (i.e. operator) to use its discretion in deciding whether or not to allow broadcast programming that "describes or depicts sexual or excretory activities or organs in a patently offensive manner as measured by contemporary community standards" on leased access channels, was declared constitutional.[155] Justice Breyer analogized the case with *Pacifica*, declaring "[c]able television is as easily 'accessible to children' as over-the-air broadcasting."[156] Justice Breyer also found offensive material on cable television to contain the privacy and surprise elements akin to *Pacifica*.[157] Also, like *Sable*, Justice Breyer found the governmental interest in protecting children from "patently offensive depictions of sex" to be compelling.[158] The Court, thus, conducted the strict scrutiny analysis like that in *Sable*, and found, unlike *Sable*, that the Government's means of protecting children was truly the least restrictive infringement on the First Amendment rights of cable operators and viewers.[159] The provision, despite allowing cable operators the right to ban patently offensive programming completely, also permits the rescheduling of such programs, or even the choice to fully allow such programming, thus sufficiently tailoring the statute.[160] Finally, Justice Breyer specifically noted the

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Amendment of the United States Constituion); Alliance for Community Media v. F.C.C., 10 F.3d 812 (1993) (challenging the constitutionality of Sections 10(a), 10(b), and 10(c) of the Cable Television Consumer Protection and Competition Act of 1992).

[153] Leased access television are channels reserved under federal law for commercial lease by parties unaffiliated with the cable television system operator. *Denver Area*, 116 S.Ct at 2381.

[154] *Id.* Public access television are channels local governments require be dedicated for public, educational, and governmental programming. *Id.*

[155] *Id.* at 2381, 2398.

[156] *Id.* at 2386.

[157] *Id.*

[158] *Denver Area Consortium*, 116 S. Ct. at 2378.

[159] *Id.* at 2389.

[160] *Id.* at 2387.

language of the statute, in that it specifically defined its terms, thus rejecting any claim of vagueness.[161] The third provision, like the first, gave cable operators the discretion whether or not to allow patently offensive programming.162 However, the third provision differed from the first in that the third provision was applicable to public, educational, and government access channels, but not leased access channels.[163] Applying strict scrutiny, the Court found the restriction on speech to be an unconstitutional infringement on the First Amendment rights of viewers and programmers.[164] Because of the history of public access channels, as well as the legislative history of the Act and the prior proceedings before the FCC, the Court found this provision of the Act to be unnecessary to protect children, and thus, inappropriately tailored to achieve that interest.[165]

Likewise, the second provision, requiring leased channel operators to separate and block patently offensive programming, was rejected.[166] The second provision was not sustained because it required, not merely permitted, cable operators to restrict speech in a manner that was not the least restrictive.[167] Justice Breyer, without discussing the constitutionality of the alternatives available to cable operators, provided more narrowly tailored means to further the government's interest in protecting children.[168]

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[161] *Id.* at 2390. Like *Pacifica, Denver Area Consortium* specifically measured "patently offensive" by contemporary community standards for the broadcast medium, and specifically listed that which was prohibited. Id.

[162] 106 STAT. 1486, § 10(c).

[163] *Denver Area Consortium,* 116 S. Ct. at 2381.

[164] *Id.* (striking down the second provision of the Act which required channel operators to "segregate and to block . . . patently offensive" programming).

[165] *Id.* at 2394 (holding that the provision was not "narrowly, or reasonably, tailored . . . to protect children").

[166] 106 STAT. 1486, § 10(b).

[167] *Denver Area Consortium,* 116 S. Ct. at 2391 (explaining that the second provision failed strict scrutiny analysis because it was not narrowly tailored).

[168] *Id.* at 2392 (providing scrambling, blocking, and the "V-chip" as less restrictive means to prevent children from viewing inappropriate material, while still allowing cable operators to carry the programming, thus protecting their First Amendment privilege).

C. The Communications Decency Act of 1996

In performing "a word by word" examination of Section 223(a) of the Communications Decency Act of 1996, it is difficult to decipher permissible acts from acts which are criminal.[169] Such a discrepancy strikes at the core of due process. Because vagueness in a criminal statute inherently breeds discrimination, uncertainty, and inconsistency, it is essential under our Constitution for not only the offender, but also for the prosecutor, to know what is punishable under our laws.[170] Moreover, when First Amendment infringement is placed at issue by a Congressional statute, "stricter standards of permissible statutory vagueness may be applied to a statute" for such a law may stifle one of an individual's most basic freedoms: his freedom of expression.[171]

Section 223(a) of the Act used the term "indecent" as the criterion for establishing those communications that could not be transmitted knowingly to a minor.[172] In Section 223(d), Congress specifically defined the first hurdle that any sender of material over the Internet must pass: that is, the material could not be "offensive."[173] However, nowhere in the text of the Act was the second criteria, "indecent," defined.[174] Moreover,

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[169] ACLU v. Reno, 929 F. Supp. at 859 (explaining the requisite dissection necessary to sustain a criminal statute challenged for vagueness).

[170] *Id.* at 860 (reiterating the settled principle that a narrow definition is required of all terms of a statute, particularly one in which a violation may result in the loss of life, liberty or property).

[171] *Id.* at 860 (citing Smith v. California, 361 U.S. 147 (1959), explaining that "a statute having a potentially inhibiting effect on speech" requires the most rigid of examination, for the free exchange of ideas may be at stake).

[172] 47 U.S.C.A. § 223(a).

[173] 47 U.S.C.A. § 223(d) (defining "patently offensive" communication as that communication which "depicts or describes . . . sexual or excretory activities or organs" in the context of "contemporary community standards"); *see also Miller*, 413 U.S. at 25-26 (setting forth the some examples of material that a state, within its authority, may find obscene).

[174] *See* 47 U.S.C.A. § 223. The Government argued, and the Conference Reports suggested, that the two terms were intended to apply interchangeably. *Reno*, 929 F. Supp. at 850,861-62. In *Pacifica*, and other landmark cases, the term "indecent" has specifically been defined by contemporary community standards. *See, e.g., Pacifica*, 438 U.S. at 732. Section 223(a) of the Communications Decency Act, however, made no such reference to community

previous Supreme Court cases which placed the terms "indecent" and "patently offensive" at issue, were limited only to the fields of public theater, broadcasting, and telephone communications, never exploring the world of cyberspace.[175] Therefore, in the world of cyberspace, what is "indecent?"[176] How is "patently offensive" to be measured?[177] The dispersing of material in cyberspace, in effect, cuts down community borders making community standards a single standard rather than different in each community.[178] Although the Act specified "contemporary community standards," a general content provider would actually have to apply the law of the most restrictive community in order to avoid the risk of criminal prosecution.[179] Therefore, what line may not be crossed, whereby misjudgment could result in imprisonment?[180] Opponents claimed that the Act was so potentially overbroad and inconsistent in its application, for it would not have just limited adults to that which is suitable for kids, but it could have gone so far as to infringe upon material that is protected even for children.[181] Congress's use of the undefined

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standards. *Reno*, 929 F. Supp. at 862-63.

[175] *See generally Pacifica*, 438 U.S. 726; *Sable*, 492 U.S. 115; *Denver Area Consortium*, 116 S. Ct. 2374.

[176] Reno, 929 F. Supp. at 864 (inquiring whether contributions to art, politics, education, and health such as "artistic photographs of a nude man with an erect penis, depictions of Indian statues portraying different methods of copulation, or the transcript of a scene from a contemporary play about AIDS could be considered 'indecent' under the Act").

[177] *Id.*

[178] *See Shea*, 930 F. Supp. at 936; *see also Reno*, 929 F. Supp. at 855.

[179] *Shea*, 930 F. Supp. at 937. The New York Court, however, found this line of argument unpersuasive. *Id.* The Court found "no basis for concluding that Internet content providers are any less capable than those subject to obscenity laws or other indecency restrictions to acquire a general familiarity with the relevant standards." *Id.* However, the Court did not dismiss, nor address, the possibility of overbreadth regarding this issue. *Id.* at 938. The Pennsylvania Court, however, did address this area of overbreadth and found the requirement of tailoring communications to the most restrictive community unconstitutionally overbroad. *See also Reno*, 929 F. Supp. at 855.

[180] 47 U.S.C.A. §§ 223(a) and (d) (providing that any violation of these sections could result in a fine, or imprisonment up to two years, or both).

[181] In *Erznoznik*, Justice Powell said, "[c]learly all nudity cannot be deemed obscene even as to minors." 422 U.S. at 213.

term "indecent" could actually have made discussions of art, politics, and news, felonious acts.[182] It was the subjectivity of the Act, according to Judge Buckwalter in *ACLU*, that made Sections 223(a) and 223(d)[183] so dangerous to an individual's liberty.[184] Due process does not permit such subjectivity.[185] Nonetheless, the New York District Court in *Shea* sharply disagreed with the Pennsylvania Court's struggle with the terms "indecent" and "patently offensive."[186] The *Shea* Court found the terms well defined by Court of Appeals and Supreme Court precedent irrespective of the viewing or listening medium.[187] The New York Court found implicit in *Pacifica* a "generic definition of 'indecent'. . . capable of surviving a vagueness challenge."[188]

What the New York District Court and the Pennsylvania District Court did agree on was the overreach of the Statute.[189] That is, Sections 223(a) and 223(d) of the Act could have had the effect of restricting speech that is constitutionally protected to adults.[190] The plaintiffs in both *ACLU* and *Shea* argued that the Communications Decency Act of 1996 placed a restriction on speech that has been declared constitutionally protected.[191] Therefore, the Act must survive strict scrutiny or fall.[192] In other words, the Act must be justified by a compelling government interest, one which must outweigh the loss of constitutionally protected rights, and must be narrowly tailored to further that interest.[193]

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[182] *Reno*, 929 F. Supp. at 845.

[183] *See supra* note 56.

[184] *Reno*, 929 F. Supp. at 864-65.

[185] *See Shea*, 930 F.Supp. at 936.

[186] *See Shea*, 930 F. Supp. at 936.

[187] *Id.*

[188] *Id.* at 935.

[189] *Id.* at 936. Although the New York District Court did not find Section 223(d) unconstitutionally vague, the court, like the Pennsylvania District Court, found the Section an unconstitutional infringement on the First Amendment rights of adults. *Id.* at 935-41.

[190] *Id.* at 937-38; *see also Reno*, 929 F. Supp. at 855.

[191] *See Reno*, 929 F. Supp. at 854; *see also Shea*, 930 F. Supp. at 922.

[192] *See Shea*, 930 F. Supp. at 940 (applying strict scrutiny analysis like that performed in *Denver Area Consortium*).

[193] *Id.* at 939.

Specifically, the Act must have been written so that it would least impair an individual's freedom of speech while still promoting the compelling governmental interest.[194]

Before performing such a test, however, the medium must be established.[195] Because "an Internet user must act affirmatively and deliberately to retrieve specific information online" the Pennsylvania District Court equated the medium of cyberspace to telephone communication, thus holding *Sable* the applicable law.[196] In *Sable*, the Court found the blanket ban over dial-a-porn messages to be a broad restriction in violation of the First Amendment.[197] However, the Court noted that narrower restrictions on the First Amendment rights of adults would be permissible so long as the government's interest was compelling and the narrower restrictions were the most tailored to further that governmental interest.[198] Therefore, assuming a compelling governmental interest, the suggested means mentioned by the Court in *Sable* may have been applicable here.[199] Moreover, because accessibility of cyberspace occurs predominantly via the personal computer, the "invasion of the home" element of *Pacifica* was also applicable, thus, paving the way for a significant restriction on the communications at issue here.[200]

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[194] *Id.* at 940.

[195] *See generally Pacifica*, 438 U.S. at 742 (discussing the importance of context in determining whether speech may be restricted).

[196] *See Reno*, 929 F. Supp. at 851-52. Accessing information on the Internet, like dialing a telephone, requires knowledge of who or what you are contacting and a conscious decision to reach that person or site, thus eliminating or at least significantly reducing the surprise factor significant in *Pacifica*. *See generally Sable*, 492 U.S. at 127-28.

[197] *Id.* at 130-31.

[198] *Id.* at 126.

[199] *Sable, 492 U.S. at 126-28.* Courts have always found the protection of children from offensive, thus damaging, material to be a compelling governmental interest. *See, e.g., Id.*, at 126 (extending the interest "to shielding minors from the influence of [material] that is not obscene by adult standards" but only permitting government infringement if the means chosen were narrowly tailored to further this interest). The Court offered credit card, access code, and scrambling rules, but not blanket restriction, as satisfactory solutions to the problem of keeping indecent dial-a-porn messages out of the reach of minors. *Id.* at 128.

[200] *See generally* FCC v. Pacifica, 438 U.S. 726 (1978).

Section 223(e) of the Communications Decency Act of 1996 provided a "safe harbor" defense, which the Government contended narrowly tailors the Act.[201] That section provided, in pertinent part, that:

> It is a defense to a prosecution . . . that a person has taken, in good faith, reasonable, effective, and appropriate actions under the circumstances to restrict or prevent access by minors to a[n] [indecent] communication . . . which may involve any appropriate measures to restrict minors from such communications, including any method which is feasible under available technology; or has restricted access to such communication by requiring use of a verified credit card, debit account, adult access code, or adult personal identification number [202]

Thus, the Government claimed that the Act, unlike *Sable*, was not a complete ban on offensive and indecent material; but instead, was narrowly tailored to restrict children's access to inappropriate material, while least restricting adult access.[203] However, petitioners ACLU and Shea countered that the defense provided for in the Act is technologically impossible in most cases, thus leaving content providers with two options: censor your speech, or face criminal liability.[204] In *Sable*, the Court found such an ultimatum an impermissible restriction on speech.[205] The New York and Pennsylvania District Courts agreed likewise, finding the defenses provided in the Act unfeasible in the world of cyberspace.[206] In both cases, there was significant testimony regarding the many solutions offered by the government (i.e. age verification,[207] credit card

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[201] 47 U.S.C.A. § 223(e)(5)(A)(B).

[202] *Id.*

[203] *See generally Reno*, 929 F. Supp. 824; *see also generally Shea*, 930 F. Supp. 916.

[204] *See generally Reno*, 929 F. Supp. 824; *see also generally Shea*, 930 F. Supp. 916.

[205] *Sable*, 492 U.S. at 126.

[206] *Reno*, 929 F. Supp. at 856-57; *see also Shea*, 930 F. Supp. at 948-50.

verification,208 adult password verification,[209] or tagging[210]), and each opinion detailed the feasibility of such solutions.[211] Both district courts concluded that each "solution" was not workable.[212] Moreover, foreign providers, who are believed to account for over forty percent of content on the Internet, would still have the potential to circumvent the solutions.[213]

Opponents of the Communications Decency Act of 1996 feel the

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[207] *Reno*, 929 F. Supp. at 845 (stating that there is not presently "a reliable way to ensure that recipients and participants in [newsgroups or chat rooms] can be screened for age"). "[T]he identification systems ha[ve] no practical application for Internet activities like chat rooms and news groups in which participants talk to one another. Forty million people use such interactive formats . . . in contrast with the 100,000 Web sites for which screening techniques might be feasible.". Greenhouse, *supra* note 6, at B10.

[208] *Reno*, 929 F. Supp. at 845-46 (stating that "[v]erification of a credit card number over the Internet is not now technically possible" due to the insecure nature of the Internet). Verification actually occurs off-line and there was no evidence submitted that a verification agency would process a credit card without a commercial transaction. *Id.* Even assuming arguendo that a verification agency would process a credit card without a transaction, the fee of such a service multiplied with the number of visitors to a web site - particularly a non-commercial web site - would make such a screening device economically impossible for the provider. *Id.* Moreover, underlying the notion of credit card verification lies the false assumption that every adult possesses a credit card. *Id.*

[209] Greenhouse, *supra* note 6, at B10 (reporting the Deputy Solicitor General's assertion that identification cards are available for as little as five dollars per year). However, such cards are ineffective in the e-mail and chat room fora. *Id.*

[210] *Reno*, 929 F. Supp. at 847 (stating that tagging would involve "requir[ing] all content providers that post arguably 'indecent' material to review all of their online content"). Such a proposal would be "extremely burdensome." *Id.* To avoid the cost "of reviewing each file individually, a content provider could tag its entire site but this would prevent minors from accessing much material that is not 'indecent' under the [Act]." *Id.* at 847-48. Moreover, there is no evidence that such a label or tag would actually block transmissions, thus, such a task is actually an exercise in futility. *Id.* at 847.

[211] *Id.* at 845-48; *see also Shea*, 930 F. Supp. at 942-47.

[212] *Reno*, 929 F. Supp. at 858; *see also Shea* 930 F. Supp. at 948.

[213] *Reno*, 929 F. Supp. at 848-49. However, the Supreme Court did not give much weight to this factor because the United States could pave the way for other countries to follow when it comes to public policy. Greenhouse, *supra* note 6, at B10.

best answer lies in user-based technology.[214] Such technology eliminates the government's role in regulating speech that has already been determined constitutionally protected, and gives parents control over what their children see.[215] Many software companies market software at reasonable prices[216] that empower adults to limit the Internet access of children.[217] Such software is designed to enable parents to filter out material and selectively block access to communications they feel are inappropriate for their children, while still allowing them unimpeded access.[218]

IV. RENO V. ACLU[219]

On March 19, 1997, the United States Supreme Court heard oral arguments on the Communications Decency Act of 1996.[220] The primary concern of the Court appeared to be the availability of technology to filter or mark material not suitable for children and the cost of such technology to both commercial and non-commercial providers.[221] In other words, the Court appeared to be focusing on whether the defenses provided for in

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[214] *See* plaintiff's complaint at 2, *American Library Assoc. v. U.S.* (No. 96-1458); *see also Reno*, 929 F. Supp. at 842, 883 (discussing user-based technology).

[215] Melvin, *supra* note 1, at 5D (discussing how several on-line services now "offer controls that can block out information parents don't want children to see").

[216] *See Reno*, 929 F. Supp. at 839-842 (listing prices ranging from twenty dollars to sixty dollars for such software, and reporting that several major providers offer parental control options free of charge to their members).

[217] *Id.* at 842 (stating that "although parental control software currently can screen for certain suggestive words or for known sexually explicit sites, it cannot now screen for sexually explicit images unaccompanied by suggestive text unless those who configure the software are aware of the particular site").

[218] *Id.*

[219] 117 S.Ct. 2329 (1997).

[220] *See Reno v. ACLU -- Transcript of Supreme Court Oral Argument* (visited Mar. 24, 1997) <http://www.aclu.org/issues/cyber/trial/sctran.html.>. The Government in the Pennsylvania case appealed directly to the Supreme Court as per 104 Pub.L. § 561(b) (providing a right of direct appeal to the Supreme Court for any Constitutional challenge to the Communications Decency Act of 1996).

[221] *Id.*at 2-4, 13-15, 17-22.

Section 223(e) of the Act were feasible, thus, making the Act the least restrictive means of furthering the government's interest.[222] According to respondents' attorney, Bruce J. Ennis, the available technology that screens for children remains either prohibitively expensive for non-commercial sites or impractical for Internet activities in which participants talk to one another.[223] The answer, according to Mr. Ennis, is contained in the less restrictive alternative of allowing parents to limit their children's Internet access.[224]

Additionally, Justice Souter raised an interesting issue that appeared to surprise Government attorney, Seth P. Waxman. Justice Souter inquired as to whether Section 223(d) of the Act could make criminals out of parents who make the Internet available to their children, since that section prohibited the knowing use of a computer to display patently offensive material in a manner available to a child.[225] Mr. Waxman conceded that the Act could be interpreted in that manner and invited the Court to alter Section 223(d) to exempt parents (in that situation) from liability.[226]

In light of *Denver Area Consortium,*[227] it was difficult to predict

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[222] *Id.*

[223] *Id.* at 16-19.

[224] *Id.* at 22 (providing that user technology exists, that not only circumvents the deficiencies of the Act (i.e. its overbreadth, its potential restriction on material that is not indecent, its failure to account for the influx of indecent and obscene foreign communications, the financial burdens and technological concerns it imposes), but it also protects children more effectively). *But see also id.* at 14 (providing the Government's response to whether the use of such parental software was a defense under the Act). The Government claimed that available parental control software was not capable of keeping up with the plethora of material that is rapidly increasing, thus, use of such software was insufficient to constitute a defense under the Act. *Id.* Moreover, Justice Kennedy expressed concern over protecting children who do not have parents available to restrict their access to inappropriate material. *Id.* at 29.

[225] *Reno v. ACLU -- Transcript of Supreme Court Oral Argument* (visited Mar. 24, 1997) <http://www.aclu.org/issues/cyber/trial/sctran.html.>. at 10-12.

[226] *Id.* at 12. Of equal concern to Justice Breyer was the notion of prosecuting teen-agers who converse over the Internet about their "sexual experiences . . . real or imagined," and subjecting them to two years imprisonment. *Id.* at 7.

[227] *See generally Denver Area Consortium,* 116 S. Ct. at 2385 & 2397-98 (sustaining a very narrow restriction on speech in the context of leased access television).

how the Supreme Court would rule on the Communications Decency Act of 1996. At oral argument, the Court appeared to steer away from the issue of vagueness.[228] However, it was certainly possible for the Court to find the terms of the Act impermissibly vague, and thus, in violation of the Due Process Clause of the Fifth Amendment. The Court could have required Congress to better define the language of the Act, specifically, how the term "indecent" should be measured and applied, in order to prevent subjectivity, discrimination, and inconsistency in prosecutions under the Act.[229] Most importantly, however, the Court had to determine the context of cyberspace in order to apply the proper standard of review previously set forth in the broadcast medium cases, as well as the public theater and telephone communication cases, to determine whether the Act was an impermissible restriction on the First Amendment rights of

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[228] *Reno v. ACLU -- Transcript of Supreme Court Oral Argument* (visited Mar. 24, 1997) <http://www.aclu.org/issues/cyber/trial/sctran.html.> at 21-22. However, Justice O'Connor did state that "[t]he Act just isn't specific." *Id.* at 21.

[229] *See, e.g.*, H.R. 3089, 104th Cong., 2d Sess. (1996) (proposing an amendment to the Act, sponsored by House Representative Anna Eshoo, entitled the "Online Parental Control Act of 1996").

The proposal, in pertinent part, amended Section 223(a) of the Act and replaced the term "indecent" with "harmful to minors." Also amended was Section 223(d), replacing "patently offensive" with "harmful to minors" and defining "harmful to minors" as any "sexually explicit matter" which meets all of the following criteria:

> a) Considered as a whole, the matter appeals to the prurient interest of minors.
>
> b) The matter is patently offensive as determined by contemporary local community standards in terms of what is suitable for minors.
>
> c) Considered as a whole, the matter lacks serious literary, artistic, political, educational, or scientific value for minors."

Finally amended was Section 223(e), which added, in pertinent part, that any person, who has, "in good faith labeled such communications as inappropriate for minors, placed such communications in a segregated access site identified as inappropriate for minors, or otherwise established a mechanism . . . enabl[ing] such communications to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening" shall not be held civilly or criminally liable for making available to a minor a communication that is harmful to minors. *Id.*

adults.[230] Nearly fifty years ago, in *Kovacs v. Cooper*,[231] Justice Jackson wrote that "[t]he moving picture screen, the radio, the newspaper, the handbill, the sound truck and the street corner orator have differing natures, values, abuses and dangers. Each [means of expression] is a law unto itself. . . . "[232] The Court could have even applied a new standard of review due to the unique nature of the Internet.[233]

On June 26, 1997, the Supreme Court rendered its decision on the constitutionality of the Communications Decency Act of 1996.[234] In a 7-2 decision, the Supreme Court affirmed the Pennsylvania District Court decision and struck down the Communications Decency Act of 1996 as unconstitutional.[235] Writing for the majority, Justice John Paul Stevens afforded speech on the Internet the highest level of First Amendment protection, similar to that given to books and newspapers.[236] Justice Stevens, finding the Internet not to be as pervasive a medium as television likened the restrictions of the Communications Decency Act to "the ban on 'dial-a-porn' invalidated in *Sable Communications of California, Inc. v. FCC*."[237] Because of the active search that is required of Internet users

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[230] *See Pacifica*, 438 U.S. at 748 (stating that "each medium of expression presents special First Amendment problems"). Justice Stevens, in *Pacifica*, recognized that the monologue that could be restricted in *Pacifica*, "[might] be protected in other contexts." *Id.* at 746.

[231] 336 U.S. 77 (1949).

[232] *Id.* at 97. *See* Linda Greenhouse, *What Level of Protection for Internet Speech?*, N.Y. TIMES, March 24, 1997, at D5 (quoting the excerpt from Justice Jackson's concurring opinion).

[233] *See Reno*, 929 F. Supp. at 830 (discussing how "the exponentially growing, worldwide medium that is the Internet . . . presents unique issues relating to the application of First Amendment jurisprudence and due process requirements . . . .").

[234] *See generally Reno*, 117 S.Ct. 2329 (1997) (consolidating ACLU v. Reno and Shea v. Reno).

[235] *Id.* at 2333, 2351. The majority opinion was written by Justice Stevens and signed by Justices Breyer, Ginsburg, Kennedy, Scalia, Souter and Thomas. Justice O'Connor wrote a separate opinion signed by Chief Justice Rehnquist, concurring in part and dissenting in part. *Id.*

[236] *See* Linda Greenhouse, *Decency Act Fails, Effort to Shield Minors Is Said to Infringe the First Amendment*, N. Y. TIMES, June 27, 1997, at A1 (analyzing the decision).

[237] *Reno*, 117 S.Ct. at 2346 & n.40.

in order to be subjected to indecent material, *Sable* was most applicable.[238]

Despite finding the protection of children a compelling governmental purpose, Justice Stevens, applying the rationale of *Sable*, found the defense provided for in the Act not to be sufficiently tailored so that adult access to constitutionally protected material was least restricted.[239] In most cases, individuals would truly have been left with only one option - censorship. The Constitution requires a less restrictive option. Because the Government failed to proffer any less restrictive alternative than those offered in Section 223(e), the Communications Decency Act of 1996 could not be sustained.[240]

The majority also found "singularly unpersuasive" the Government's position that the Act is necessary because content on the Internet is "driving countless citizens away from the medium because of the risk of exposing themselves or their children to harmful material."[241] The Court found growth on the Internet to be so exponential that it should be "presume[d] that governmental regulation of the content of speech is more likely to interfere with the free exchange of ideas than to encourage it."[242] Justice Stevens found that "the interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[243]

As to whether the Act was so vague that it violated the Fifth Amendment, the Court found the terms indecent and patently offensive, as used in the Act, to be unconstitutionally vague.[244] The Court found that under the terms of the Communications Decency Act, there was "a greater threat of censoring speech that, in fact, falls outside the statute's scope. Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional

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[238] *Id.* at 2343 (quoting *Sable*, 127 S.Ct. 115, 127-28 (1989)).

[239] *Id.* at 2348.

[240] *See generally* Reno v. ACLU, 117 S.Ct. 2329, 2349-50 (1997).

[241] *Id.* at 2351.

[242] *Reno*, 117 S.Ct. at 2351 (rejecting the Government's argument that indecent material will stunt the growth of the Internet).

[243] *Id.*

[244] *Id.* at 2344, 2446.

protection."[245] Justice Stevens added, "[Such a] burden . . . cannot be justified if it could be avoided by a more carefully drafted statute."[246]

In a separate opinion written by Justice O'Connor and signed by Chief Justice Rehnquist, the two Justices concurred with most of the majority's opinion but dissented in regard to a portion of Section 223(a).[247] Justices O'Connor and Rehnquist found this section not to be unconstitutional in all cases.[248] Because Section 223(a) forbade those transmissions knowingly sent to a recipient who is under eighteen, the Justices found that Section 223(a) would not be overreaching in the case of a one to one - adult to child - transmission, or a transmission from one adult to an otherwise all children audience.[249] The dissenting opinion analogized this specific audience theory with the Court's decision in *Ginsberg v. New York.*[250] In *Ginsberg*, the Supreme Court sustained a New York law that barred store owners from selling pornographic magazines to minors.[251] The Court upheld such a ban primarily because it did not infringe upon an adult's ability to purchase the same.[252] The law simply created "adult zones" that only restricted a child's access.[253] In *Reno*, however, the dissenters agreed with the majority's view that such zones are generally not feasible in the world of cyberspace because of the virtual impossibility and impracticability of keeping children from indecent transmissions while still allowing adults unimpeded access.[254] But, Justices O'Connor and Rehnquist found the specific audience exceptions not to be overreaching, because, in those scenarios, no two adults would be in communication, therefore, no adult would be deprived of receiving material from another adult or sending to another adult material that which

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[245] *Id.* at 2346.
[246] *Id.*
[247] *Reno*, 117 S.Ct. at 2351-53.
[248] *Id.* at 2354.
[249] *Id.* at 2355.
[250] *Id.* at 2353.
[251] *Id.*
[252] *Id.*
[253] *Reno*, 117 S.Ct. at 2353.
[254] *Id.*

he/she is constitutionally permitted to send.[255] The specific audience exceptions create a constitutionally permissible zone for children where adults may not transmit indecent material.[256] Nevertheless, this position did not receive the support of the majority.[257]

V. CONCLUSION

In his dissent in *Pacifica*, Justice Brennan stressed "the time-honored right of a parent to raise his child as he sees fit . . . ."[258] On February 8, 1996, President Clinton and Congress attempted to thrash this right. The Communications Decency Act of 1996 blatantly displayed a hypocritical lack of confidence in the family values of America that President Clinton so vehemently stressed in his election campaign. There is little doubt that certain material is best left to an adults-only audience, however, it is still for Mom and Dad, in the first place, to decide what their child should see and read. After all, as Justice Brennan conveyed in *Pacifica*, some parents may actually find it healthy to expose their children to material that others find inappropriate. Such exposure, if effectuated in a manner that a parent sees fit, has the ability to "defuse the taboo" that often inappropriately surrounds such material.[259] That decision is a parent's natural right. On June 26, 1997, the Supreme Court honored this right. [260]

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[255] *Id.* at 2354-55.

[256] *Id.*

[257] *Id.* at 2356 (stating, "[t]he Court reaches a contrary conclusion, and from that holding that I respectfully dissent").

[258] *Pacifica*, 438 U.S. at 769 (Brennan, J., dissenting).

[259] *Id.* at 770.

[260] *See* Reno v. ACLU, 117 S.Ct. at 2341. In reaching its decision, the Court acknowledged its consistent recognition of the principle that "the parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society." *Id.* " It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Id.* at n.31. Immediately following the decision, President Clinton stated "he would convene industry executives and groups representing parents, teachers and

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librarians to seek a solution to the problem of on-line pornographic material." *See* John M. Broder, *Clinton Readies New Approach on Smut*, N. Y. TIMES, June 27, 1997 at A21.